

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1900

No. 181 *431*

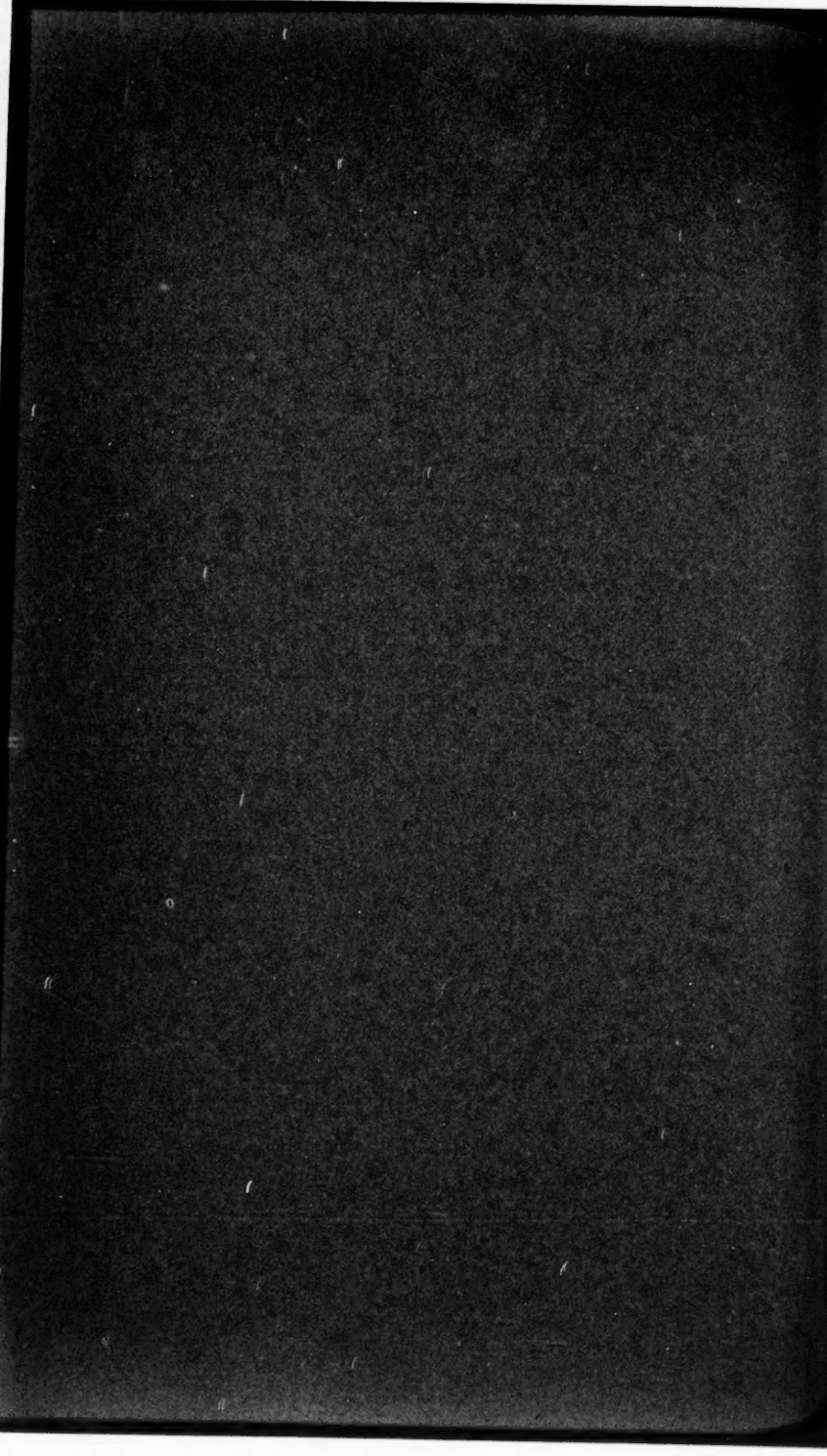
PERCY H. BRUNDAGE, APPELLANT,

BROADWAY REALTY COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

FILED FEBRUARY 2, 1901.

(22,019)



(22,010)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 784.

PERCY H. BRUNDAGE, APPELLANT,

v.

BROADWAY REALTY COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print
Bill of complaint.....	1	1
Answer.....	9	5
Final decree dismissing suit.....	12	7
Petition of appeal.....	13	8
Order allowing appeal.....	14	8
Assignment of errors.....	15	8
Bond.....	17	9
Citation and service.....	20	10
Clerk's certificate.....	22	11



Bill of Complaint.

In the Circuit Court of the United States for the Southern District
of New York.

In Equity.

PERCY H. BRUNDAGE, Complainant,
against

BROADWAY REALTY COMPANY, JOSEPH F. STIER, CHARLES J. PEABODY, George Foster Peabody and Gardiner M. Lane, Defendants.

To the Honorable the Judges of the Circuit Court of the United States
in and for the Southern District of New York :

Percy H. Brundage of the City of New York and a citizen of the State of New York and a stockholder in the Broadway Realty Company, brings this his bill of complaint in behalf of himself and all other stockholders who are similarly situated and who shall be entitled to avail themselves of the benefit of this suit against the said Broadway Realty Company, a corporation organized and existing under the laws of the State of New York and an inhabitant of the Southern District of New York and having its principal office in the said District, and Joseph F. Stier of the City of New York and a citizen and inhabitant of the State of New York and Southern District of New York, Charles J. Peabody and George Foster Peabody of Lake George New York and citizens and inhabitants of the State of New York and Northern District of New York, and Gardiner M. Lane of Boston and a citizen and inhabitant of the State of Massachusetts and District of Massachusetts, And thereupon your orator complains and says,

1. The defendant, the Broadway Realty Company, hereinafter styled the defendant company, is a corporation organized and existing under and by virtue of the laws of the State of New York and is a citizen and inhabitant of said State and has its principal place of business at No. 52 William Street in the Borough of Manhattan in the City of New York in the Southern District of New York. The capital stock of said defendant company consists of One million dollars (\$1,000,000) divided into Ten thousand (10,000) shares of the par value of One hundred (\$100) dollars each. Said defendant company is organized for profit and was formed for the purpose of owning, holding and managing real estate. It owns the office building situated at Nos. 5-11 Broadway in the Borough of Manhattan and City of New York and also certain securities. It is engaged in the business of managing said building, collecting the rents thereof, collecting the income upon said securities and dividing the net income, if any, after payment of all debts and charges, among the stockholders. Said business is transacted and conducted wholly within the City and State of New York. Said defendant company

is engaged in no other business whatever. The entire income of the defendant company is exclusively derived from the rental of said real estate and the income upon said securities.

II. The net income of the defendant company for the year ending December 31, 1909 exceeded Fifty thousand (\$50,000) dollars after deducting all expenses, charges, losses, depreciation and taxes; and all interest paid within the year upon its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid up capital stock of the defendant company, and all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations or insurance companies.

III. The defendant, Joseph F. Stier, resides in the City and County of New York and is a citizen and inhabitant of the State of New York and Southern District of New York. The defendants, Charles

J. Peabody and George Foster Peabody, reside at Lake George,
3 New York, and are citizens and inhabitants of the State of

New York and Northern District of New York. The defendant Gardiner M. Lane, resides in Boston and is a citizen and an inhabitant of the State of Massachusetts and District of Massachusetts. The said individual defendants compose the Board of Directors of the defendant company, there being one vacancy in said Board at the present time due to the recent death of the late Spencer Trask, in his life time a Director of the said defendant company, which vacancy has not yet been filled.

IV. Your orator is a stockholder in the defendant company and the owner and registered holder of six (6) shares of the outstanding stock thereof of the par value of Six hundred (\$300) dollars and of an actual value exceeding One hundred and fifty (\$150) dollars.

V. By the Certificate of Incorporation of the defendant company and by and under the laws of the State of New York, the management of the property and affairs and concerns of the defendant company is committed to its Board of Directors. Your orator is informed and verily believes that said Board of Directors claim and assert that under and by virtue of the alleged authority of the provisions of an Act of Congress of the United States entitled, "An Act to provide revenue to equalize duties and encourage the industries of the United States and for other purposes," enacted on or about August 5th 1909, said defendant company is or will be on or before June 30th 1910 liable to pay to the United States a tax of one percentum upon the entire net income over and above the sum of Five thousand dollars (\$5,000) received by said defendant company from all sources during the year ending December 31, 1909, to be computed as provided in said Act, and otherwise to comply with the provisions of said Act.

VI. Your orator is informed and verily believes that the defendant company has received a notice from the United States Collector of

Internal Revenue for the Third District of New York calling
4 upon the defendant company to furnish certain information intended to facilitate said Collector and the other taxing authorities of the United States in the imposition, assessment and collection of the tax mentioned and set forth in the said Act of Con-

gress and that the officers and directors of said defendant company intend to furnish said Collector with the information requested and to make such reports and returns as such Collector or any other revenue officer of the United States Government may request, and to comply in all respects with said Act of Congress and pay the tax imposed thereby, whenever the same shall have been ascertained and shall have become due and payable.

VII. Your orator has requested the officers and directors of the defendant company to refuse to comply with the provisions of said Act of Congress and to take all such measures as may be available to contest the validity of said Act, and to oppose its enforcement and resist the imposition, assessment and collection of said tax, and refuse to furnish the information and make the return provided for by said Act, upon the ground that said Act of Congress and said tax sought to be imposed thereby, are contrary to the Constitution of the United States, and therefore void and of no effect, but said officers and directors of said defendant company have nevertheless declared their intention of complying in all respects with said Act as hereinbefore set forth.

VIII. Your orator is advised and verily believes that such action on the part of the defendant company and its officers and directors in complying with said Act and making and filing the return required thereby, and paying the tax imposed thereby, which tax is, as your orator is advised, void and unconstitutional, will unlawfully divert a portion of the funds of said defendant and will thereby render the stock held by your orator, and by other stockholders similarly situated of less value.

IX. Your orator charges that the provisions in respect of said tax, contained in said Act of Congress, are unconstitutional, null and void, in that the said tax, although described in said Act as a Special Excise Tax is in fact and in legal effect a direct tax upon the property held and owned by the defendant, which direct tax is not in and by said Act apportioned among the several States, as required by the Constitution of the United States and that if said tax should be held not to be a direct tax, nevertheless said provisions of said Act are unconstitutional, null and void, in that said tax is not uniform throughout the United States as required by the United — Constitution, but applies only to corporations and associations organized and doing business for profit, and not to individuals or partnerships doing the same or similar business for profit; and further in that the tax impairs property rights vested prior to the passage of said Act of Congress and is imposed upon and in respect of income which accrued prior to the date upon which said Act was passed and approved; and further in that the subject matter upon which said tax purports to be imposed, to wit, the right or franchise to be a corporation, or the doing of business for profit by a corporation deriving its franchise from one of the several States is not within the taxing power of the United States and that such tax is an invasion of the rights and prerogatives of the several States and is a burden and tax upon a prerogative, power, instrumentality, and function of sovereignty belonging to the several States and not delegated to the United States by the Con-

stitution thereof or otherwise. Your orator further charges that the provisions in said Act in respect to the reports and returns to be made by corporations thereunder, and directing that such returns shall be public records open to inspection, violate the constitutional prohibition against unreasonable searches, and that thereby the defendant company and every corporation similarly situated may be compelled to produce and disclose their private books and papers in order to make them liable for a penalty or a forfeiture of their property and that the provisions of said Act deprive the defendant company of its property without due process of law and take private property of the defendant company for public use without just compensation, and that said Act is in other respects unconstitutional and void.

X. Your orator further sets forth that if the defendant company proceeds, as threatened, to comply with said Act of Congress, and make the returns and pay the tax required thereby, such action on its part will render your orator's stock in said corporation of less value and less productive, and that such injury is a continuing one, and one which cannot be adequately compensated in damages, and that your orator is without remedy save in a Court of Equity.

XI. Your orator further says that he was a share holder in the defendant company prior to the demand upon said defendant company to contest said tax and its refusal to do so as hereinbefore set forth and that this suit is not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance. Your orator has made very effort within his power to induce the officers and directors of the defendant company to oppose the enforcement of said Act of Congress as hereinbefore set forth and has failed to secure such action on their part by reason of their determination to the contrary, as hereinbefore set forth, and their declaration of such determination.

XII. Your orator further shows that this is a suit of civil nature in Equity and arises under the Constitution of the United States and under an Act of Congress of the United States providing for internal revenue.

7 Wherefore your orator prays as follows:

I. That a writ of subpoena may issue out of and under the seal of this honorable Court, directed to the defendant company, the Broadway Realty Company, and the individual defendants, Joseph F. Stier, Charles J. Peabody, George Foster Peabody and Gardiner M. Lane requiring and commanding them and each of them to appear in this cause upon a day certain, to be therein named, and answer the several allegations in this Bill of Complaint contained; an answer under oath being expressly waived.

II. That it be adjudged and decreed that the said provisions for said tax, known as the Corporation Income Tax, contained in said Act of Congress of August 5th, 1909, are unconstitutional, null and void:

III. That the defendant company, its officers, agents, attorneys and servants, and the individual defendants, its directors, be perpetually enjoined and restrained from complying with the provisions

of said Act, and making the returns and statements and paying the tax required thereby, and that a preliminary injunction issue out of this Honorable Court enjoining and restraining said defendant company, its officers, agents, attorneys and servants, and the individual defendants, its directors, in like manner, until the further order of the Court.

IV. That your orator may have such other and further relief in the premises as may be just, including his costs.

And your orator will ever pray etc.

COUDERT BROTHERS,

Solicitors for Complainants, 2 Rector St., N. Y.

FREDERIC R. COUDERT,

HOWARD THAYER KINGSBURY,

Of Counsel.

8 STATE AND COUNTY OF NEW YORK,
Southern District of New York, ss:

Percy H. Brundage, being duly sworn says, I am the complainant herein and reside in the City of New York and State of New York and Southern District of New York. I have read the foregoing Bill of Complaint and the same is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters I believe it to be true.

PERCY H. BRUNDAGE.

Sworn to before me this 28th day of January 1910.

[SEAL.]

ROBERT C. SPENCE,

Notary Public, N. Y. Co.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed
Jan. 28, 1910. John A. Shields, Clerk.

9

Answer.

In the Circuit Court of the United States, for the Southern District
of New York.

In Equity.

PERCY H. BRUNDAGE, Complainant,
against

BROADWAY REALTY COMPANY, JOSEPH F. STIER, CHARLES J. PEABODY, George Foster Peabody and Gardiner M. Lane, Defendants.

To the Honorable the Judges of the Circuit Court of the United States in and for the Southern District of New York.

The answer of the above named defendants, the Broadway Realty Company, Joseph F. Stier, Charles J. Peabody, George Foster Peabody and Gardiner M. Lane, to the Bill of Complaint of the above

named complainant or such part thereof as these defendants are advised is material or necessary to be answered, respectfully shows to this Court.

I. Said defendants admit the allegations contained in paragraphs Numbered I, II, III, IV, V, VI, VII, XI, and XII of said Bill of Complaint.

II. They deny the allegations contained in the paragraph Numbered VIII of said Bill of Complaint, except that they admit that compliance with the Act of Congress therein mentioned and payment of the tax imposed by said Act will render the stock held by the complainant and by other stockholders similarly situated of less value.

III. Upon information and belief they deny the allegations contained in the paragraphs Numbered IX and X of said Bill of Complaint, except that they admit that compliance with the Act of Congress therein mentioned and payment of the tax imposed by said Act will render complainant's stock in the defendant company of less value and less productive, and that said condition is a continuing one and that said diminution in value cannot be adequately measured in damages and that complainant has no remedy at law, but they deny that he is entitled to any relief either at law or in equity.

IV. And these defendants further answering, respectfully show to this Court that heretofore and prior to the making or filing of said bill of complaint it has been determined by the Board of Directors of the defendant company that the officers of said company furnish to the United States Collector of Internal Revenue for the Third District of New York the information requested by him and that the company and its officers comply in all respects with the Act of Congress imposing the tax mentioned and described in the Bill of Complaint, and that the defendant company pay said tax when ascertained; that said determination was made in good faith and with the intention of prompt and full compliance with said Act of Congress which these defendants are advised is constitutional.

V. And these defendants further answering, respectfully show to this Court that they are advised and believe that it is to the best interest of the defendant company and its stockholders that said Act should be complied with and the tax paid in accordance therewith and these defendants respectfully submit that said determination of the Board of Directors of the defendant company is legal and proper and that said Act is constitutional and that a failure on the part of the defendant company to comply therewith would subject the defendant company and its officers and directors to penalties

11 much greater in amount than the tax imposed by said Act. Wherefore these defendants having fully answered to the Bill of Complaint, so far as they are advised that the same is material or necessary to be answered unto, deny that the complainant is entitled to the relief in said Bill of Complaint prayed for or any part thereof or any relief whatsoever and they pray that they may be hence dismissed with their costs and charges in this behalf sustained or that this Court render such judgment in the

premises as will protect these defendants and govern their future actions.

[SEAL.]

BROADWAY REALTY COMPANY,
CHAS. J. PEABODY, *Sec'y*;
JOSEPH F. STIER,
CHARLES J. PEABODY,
GEORGE FOSTER PEABODY,
GARDINER M. LANE,
Defendants.

MASTEN & NICHOLS,
Solicitors for Defendants,
49 Wall St., N. Y.
GEORGE L. NICHOLS,
Of Counsel.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed
Jan. 28, 1910. John A. Shields, Clerk.

12 In the Circuit Court of the United States for the Southern
District of New York.

PERCY H. BRUNDAGE, Complainant,
against

BROADWAY REALTY COMPANY, JOSEPH F. STIER, CHARLES J. PEABODY, George Foster Peabody and Gardiner M. Lane, Defendants.

Final Decree Dismissing Suit.

The above entitled cause, having been by order of Court set for final hearing upon the bill and answer herein, duly came on for such final hearing at a Stated Term of this Court held on the first day of February, 1910, and was argued by counsel, and the Court upon due consideration of said bill and answer and the arguments of counsel being of the opinion that the provisions of the act of Congress mentioned in said bill of complaint are constitutional, valid and effectual, doth now

Order, adjudge and decree that this suit be, and the same hereby is, dismissed upon the merits.

Dated, February first, 1910.

JAMES L. MARTIN,
U. S. Dist. Judge.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed
Feb. 2, 1910. John A. Shields, Clerk.

13 United States Circuit Court, Southern District of New York.

PERCY H. BRUNDAGE, Complainant,
against

BROADWAY REALTY COMPANY, JOSEPH F. STIER, CHARLES J. PEABODY, George Foster Peabody and Gardiner M. Lane, Defendants.

Petition of Appeal.

To the Honorable James L. Martin, one of the Judges of the above named Court, presiding therein:

The above named complainant in the above entitled cause, Percy H. Brundage, conceiving himself aggrieved by the order and decree made and entered in the above entitled cause on the first day of February, 1910, wherein and whereby it was ordered and adjudged that the above entitled suit be dismissed upon the merits, doth hereby appeal to the Supreme Court of the United States from the said order and decree and each and every part thereof, for the reasons set forth in the assignment of errors filed herewith, and he prays that this his petition for said appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, February first, 1910.

COUDERT BROTHERS,
Solicitors for Complainant-Appellant,
#2 Rector Street, New York City, N. Y.

14 *Order Allowing Appeal.*

The foregoing petition of appeal is hereby granted and the appeal allowed as therein prayed.

Dated, February first, 1910.

JAMES L. MARTIN,
U. S. Dist. Judge.

15 Circuit Court of the United States, Southern District of New York.

PERCY H. BRUNDAGE, Complainant,
against

BROADWAY REALTY COMPANY, JOSEPH F. STIER, CHARLES J. PEABODY, George Foster Peabody and Gardiner M. Lane, Defendants.

Assignment of Errors.

Comes now the complainant and appellant in the above entitled cause and files the following assignment of errors upon which he will rely upon his appeal from the decree made by this Honorable

Court on the first day of February, 1910, in the above entitled cause.

I. That said Court erred in adjudging that the provisions of the Act of Congress mentioned in the bill of complaint herein are constitutional, valid and effectual.

II. That the Court erred in not adjudging that said provisions of said Act of Congress are contrary to and inconsistent with and in violation of the Constitution of the United States and hence null, void and of no effect.

III. That said Court erred in dismissing this suit and complainant's said Bill of Complaint.

IV. That said Court erred in not granting a final decree in favor of the complainant as prayed in the said Bill of Complaint.

Wherefore the said Percy H. Brundage prays that said decree of the Circuit Court of the United States for the Southern District of

New York be reversed, and that said Circuit Court be directed to grant a decree in favor of complainant for the relief prayed in the said Bill.

Dated, February 1st, 1910.

COUDERT BROTHERS,

*Solicitors for Complainant-Appellant,
#2 Rector Street, New York City, New York.*

FREDERICK R. COUDERT,

Of Counsel.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Feb. 2, 1910. John A. Shields, Clerk.

17 *Appeal Bond.*

Circuit Court of the United States, Southern District of New York.

PERCY H. BRUNDAGE, Complainant,
against

BROADWAY REALTY COMPANY, JOSEPH F. STIER, CHARLES J. PEABODY, George Foster Peabody and Gardiner M. Lane, Defendants.

Know all men by these presents, that we, Percy H. Brundage as principal and Frederic R. Coudert and Howard Thayer Kingsbury, as sureties, are held and firmly bound unto Broadway Realty Company, Joseph F. Stier, Charles J. Peabody, George Foster Peabody and Gardiner M. Lane, in the just and full sum of \$250.00/100 to be paid to the said Broadway Realty Company, Joseph F. Stier, Charles J. Peabody, George Foster Peabody and Gardiner M. Lane, their legal representatives, successors and assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this first day of February, in the year 1910.

Whereas lately at a session of the Circuit Court of the United States for the Southern District of New York in a suit pending in said Court between the said Percy H. Brundage as complainant and the said Broadway Realty Company, Joseph F. Stier, Charles J. Peabody, George Foster Peabody and Gardiner M. Lane as defendants a decree was rendered against the said Percy H. Brundage, dismissing his said suit, and the said Percy H. Brundage has obtained from said Court an order allowing an appeal to the Supreme Court of the United States to reverse said decree and a citation directed to the defendants in said suit is about to be issued citing and admonishing them to be and appear at the said Supreme Court of the United States.

Now, the condition of the above obligation is such that if the said Percy H. Brundage shall prosecute his said appeal to effect, and shall answer all damages and costs that may be awarded against him if he fail to make his plea good, then the above obligation is to be void otherwise to remain in full force and virtue.

PERCY H. BRUNDAGE,

By COUDERT BROTHERS, *Solicitors*.

FREDERIC R. COUDERT.

HOWARD THAYER KINGSBURY.

[SEAL.]

[SEAL.]

19 STATE AND COUNTY OF NEW YORK,
Southern District of New York, ss:

On this first day of February, 1910, before me personally came Frederic R. Coudert and Howard Thayer Kingsbury to me known and known to me to be two of the individuals described in and who executed the foregoing instrument and duly and severally acknowledged to me that they executed the same.

[SEAL.]

A. D. WEEKES, Jr.,
Notary Public, Nassau Co.

Cert. filed in N. Y. Co. & Register's Office.

The foregoing bond is hereby approved as to form, amount and sufficiency of sureties.

Dated, February first, 1910.

JAMES L. MARTIN,
U. S. Dist. Judge.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Feb. 2, 1910. John A. Shields, Clerk.

20 The President of the United States to Broadway Realty Company, Joseph F. Stier, Charles J. Peabody, George Foster Peabody and Gardiner M. Lane, Greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington in the District of Columbia within thirty days from the date of this citation pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the

Southern District of New York, wherein Percy H. Brundage is appellant and you are appellees, to show cause if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this first day of February in the year of our Lord one thousand nine hundred and ten, and of the independence of the United States the One hundred and thirty-fourth.

JAMES L. MARTIN,
U. S. Dist. Judge.

21 [Endorsed:] Eq. 5. 142. United States Circuit Court, Southern District of New York. Percy H. Brundage, Complainant, against Broadway Realty Company, Joseph F. Stier, Charles J. Peabody, George Foster Peabody, and Gardiner M. Lane, Defendants. E. & A. D. 3059. Citation, Coudert Brothers, Sol'rs for Complainant, 2 Rector Street, Borough of Manhattan, New York. Due service of a copy of the within citation is hereby admitted this 2d day of February, 1910. Masten & Nichols, Solicitors for Defendants. U. S. Circuit Court, Southern District, N. Y. Filed Feb. 2, 1910. John A. Shields, Clerk.

22 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby Certify that the foregoing pages, numbered from one to twenty-one inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled Percy H. Brundage, Complainant-Appellant, against Broadway Realty Company, Joseph F. Stier, Charles J. Peabody, George Foster Peabody and Gardiner M. Lane, Defendants-Appellees, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 4th day of February, in the year of our Lord One Thousand Nine Hundred and Ten, and of the Independence of the said United States the One Hundred and Thirty-fourth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] United States Supreme Court. Percy H. Brundage, Comp't-Appellant, vs. Broadway Realty Company, Joseph F. Stier, Charles J. Peabody, George Foster Peabody, and Gardiner M. Lane, Defendants-Appellees. Transcript of Record from the Circuit Court of the United States for the Southern District of New York.

Endorsed on cover: File No. 22,010. S. New York C. C. U. S. Term No. 784. Percy H. Brundage, appellant, vs. Broadway Realty Company et al. Filed February 8th, 1910. File No. 22,010.